IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 586 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

HAJARIMAL GENAJI SHAH

Appearance:

1. Criminal Appeal No. 586 of 1989
MS BINODA GAJJAR APP for appellant
RESPONDENTS served

CORAM : MR.JUSTICE A.M.KAPADIA
and
MR.JUSTICE H.H.MEHTA

Date of decision: 12/03/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE A.M.KAPADIA)

1. This appeal which is filed under Section 378 of the Code of Criminal Procedure, 1973 ('the Code' for short), is directed against the judgment and order dated April 25, 1989 rendered by the learned Additional Sessions Judge (Court No.18), City Sessions Court, Ahmedabad, in Sessions Case No.427 of 1988 acquitting the respondents ('the accused' for short) of the offences punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act' for short) and Section 66 (1) (b) of the Bombay Prohibition Act ('the Act' for short).

2. The basic facts required to be stated for the disposal of this appeal are that:

(i) Gnanji Girdharji Ahuja (P.W.2), Police Inspector of Shahpur Police Station, when he was on duty on 16.8.1988 at 8 P.M. at Shahpur Rangila Police Chowki alongwith Mahesh Babulal Naik, PSI and other police personnel, received information that one Shailesh was doing business of brown-sugar with the help of Hajarimal Genaji Shah at his house situated at Shahpur Dehlawali Street, by bringing brown-sugar from outside and at present both the said two persons were sitting in the house with brown-sugar. The aforesaid information received by Ahuja was conveyed to Mahesh Babulal Naik (P.W.4), PSI of Shahpur Police Station. On the basis of the aforesaid information, Naik called two persons to act as Panchas. Thereafter the police personnel including Ahuja PI and Naik PSI went to the house of Hajarimal Genaji Shah, A-1. When they reached there, the said house was open and two persons were sitting inside the house. Out of these two persons, one introduced himself as Hajarimal Genaji Shah, A-1 and another person introduced himself as Shailesh Hansraj Shah, A-2. During the search of that house, towards the western wall, one iron cot was found in folded condition whereupon a mattress was laid. On lifting the said mattress one black coloured pouch was found beneath the same wherein three plastic bags containing ash coloured powder were found. During the interrogation of the said two persons in the presence of panchas they informed that the said substance was brown-sugar which was intoxicant. On weighing the substance, it was weighing 750 grams, approximately valued at Rs.50,000/- During the further inquiry with regard to pass/permit the accused denied to have any such pass/permit. Five grams from each of the packets was taken for the purpose of analysis and accordingly three packets each containing the contraband

article weighing 5 grams were prepared which were put in a plastic bag, signatures of the panchas were obtained on the said bags and red wax seal of Shahpur Police Station was affixed. Rs.17/- which were recovered from the person of A-1 were also taken in the presence of the panchas as per the panchnama. Thereafter complaint in this regard was filed by Naik PSI against both the accused which was sent to PSO Shahpur Police Station together with the panchnama as well as recovered and sealed muddamal and thereafter Naik PSI started investigation.

(ii) Naik, PSI recorded the statements of Ahuja PI as well as other police personnel and informed his superior S.P. about the arrest of the accused and seizure of the muddamal. Thereafter he sent the muddamal to Forensic Science Laboratory, Ahmedabad ('the FSL' for short) on 30.8.1988 for chemical analysis. On receipt of the report from FSL certifying that the said muddamal is brown-sugar the accused were charge-sheeted for commission of the offences under the NDPS Act as well as the Act in the court of the learned Chief Metropolitan Magistrate, Ahmedabad. On committal the learned Additional Sessions Judge (Court No.18), City Sessions Court, Ahmedabad, framed charge against the accused at Ex.1 for commission of the offences under Section 21 of the NDPS Act and Section 66 (1) (b) of the Act. The charge was read over and explained to them. They pleaded not guilty to the same and claimed to be tried.

(iii) To prove the culpability of the accused, the prosecution has examined in all seven witnesses and also produced ten documents upon which heavy reliance was placed.

(iv) The learned trial Judge thereafter recorded further statements of the accused under Section 313 of the Code after recording of the prosecution evidence was over wherein also they denied the prosecution case and stated that they are innocent. However, they have not led any evidence in their defence nor examined themselves on oath.

(v) On appreciation, evaluation and analysis of the evidence led by the prosecution witnesses, the learned trial Judge has disbelieved the case of the prosecution on the premise that the evidence of the police witnesses including Naik (P.W.4), PSI and Ahuja (P.W.2), PI are bristled with lot of contradictions. All the witnesses contradict with each other. There is variance in their evidence. With regard to nonobservance of Section 57 of

the NDPS Act, there is an admission about the nonobservance and noncompliance of the provisions of Sections 41 and 42 of the NDPS Act. There is discrepancy with regard to the data of operation, seizure and sealing of the muddamal and the sip bearing signatures of the panchas affixed on the bag of the recovered muddamal. Resultantly, the learned trial Judge acquitted the accused for want of evidence as well as by giving benefit of doubt by the impugned judgment and order which has given rise to the present appeal at the instance of the appellant - State of Gujarat.

3. Ms. Binoda Gajjar, learned APP has taken us through the entire testimonial collections and submitted that while acquitting the accused, the learned trial Judge has misread the evidence of Gnanji Girdharji Ahuja (P.W.2), PI as well as that of Mahesh Babulal Naik (P.W.4), PSI. What is emphasized by her is that the learned trial Judge has given undue importance to the aspect that Ahuja PI has not reduced the information received by him into writing and has considered the same to be fatal to the prosecution case. According to her, offence against the accused is duly proved beyond reasonable doubt by the evidence of the police officers as well as panchas in whose presence the house was raided and from beneath the mattress laid on a folded iron cot brown-sugar weighing 750 grams was found and recovered. It is also emphasised by her that in view of the report of the FSL stating that the contraband article was brown-sugar the matter is required to be reconsidered by this Court and the impugned judgment and order acquitting the accused deserves to be quashed and set aside by allowing the appeal and convicting the accused of the offences with which they were charged.

4. We have considered the submissions advanced by Ms. Binoda Gajjar, learned APP for the appellant - State of Gujarat. We have also perused the impugned judgment and order, testimonial collections as well as record and proceedings of Sessions Case No.427 of 1988. We have also considered the reported decisions of the Supreme Court interpreting various statutory provisions contained in the NDPS Act.

5. There is no manner of doubt that the information was received by Gnanji Girdharji Ahuja (P.W.2), PI of Shahpur Police Station on 16.8.1988 at about 8 P.M. when he was on duty at Shahpur Rangila Police chowki. Admittedly, he was an officer under the provisions of Section 41 of the NDPS Act. The said information was conveyed by him to Mahesh Babulal Naik (P.W.4), PSI of

Shahpur Police Station. Admittedly, Naik, PSI was an officer under the provisions of Section 42 of the NDPS Act. On receipt of the said information by Naik, PSI, he called two persons to act as panchas who were made known about the information received by Ahuja PI and thereafter in the presence of two panchas as well as Ahuja, PI and other police personnel he raided the premises of A-1. As per the prosecution case, at the time of raid, both the accused persons were sitting on the iron-cot which was lying towards the western wall of the house. On lifting the mattress which was laid on the iron-cot, contraband article was found beneath the same and thereafter necessary formalities of recovery, seizure and sealing were made in the presence of panchas. Therefore the question now arises is as to whether while doing all these procedures statutory provisions contained in section 41 of the NDPS Act have been complied with.

6. To answer the aforesaid question, firstly we would examine the evidence of Gnanji Girdharji Ahuja (P.W.2) at Ex.14, who, as per the prosecution case, received prior information. Admittedly, he was an officer under Section 41 of the NDPS Act being a Police Inspector. In his oral testimony, he has unequivocally admitted that he had received the information on telephone but he has not reduced it into writing. He tried to give the explanation by saying that they were to proceed within five minutes and, therefore, he did not reduce the same into writing. During the cross-examination, he has further unequivocally admitted that he has not complied with the provisions contained in Sections 41 and 42 of the NDPS Act.

7. If we examine the evidence of Mukesh Babulal Naik, PSI (P.W. 4), at Ex.21, we find that he has also unequivocally admitted in the cross-examination that he has not reduced the information received from PI into writing. He has also tried to qualify by saying that he has not reduced it into writing as he thought that the PI must have reduced the same into writing.

8. In view of the aforesaid oral evidence of Ahuja (P.W. 2) and Naik (P.W. 4), who were respectively PI and PSI of Shahpur Police Station and being responsible officers, it is clear that they have not complied with the provisions contained in Sections 41 and 42 of the NDPS Act. There is no manner of doubt that the provisions of Sections 41 and 42 of the NDPS Act are mandatory in nature which have not been complied with.

9. The issue that noncompliance of the provisions

contained in Sections 41 and 42 of the NDPS Act is fatal to the prosecution case is no longer res integra in view of the decision of the Supreme Court in the case of State of Punjab v. Balbir Singh (1994) 3 SCC 299.

10. At the risk of repetition, we may observe that Ahuja (P.W. 2) and Naik (P.W. 4) have not complied with the provisions contained in Sections 41 and 42 of the NDPS Act and this fact has been admitted by them and hence noncompliance of the provisions of Sections 41 and 42 of the NDPS Act is fatal to the prosecution case.

11. One more defect which is noticed by us is that requirement of Section 57 of the NDPS Act has not been complied with. As per Section 57 of the NDPS Act the investigating officer has to make a full report of all particulars next after arrest or seizure within 48 hours to his immediate official superior. But that has not been done in the instant case.

12. In this connection, adverting to the evidence of Ahuja, PI, (P.W. 2), in his cross-examination he has testified that on 17.8.1988 he made a report to his official superior within 48 hours after the raid was over. Mahesh Babulal Naik, PSI, (P.W. 4) in his cross-examination has admitted that he has not made a full report of all particulars next after arrest or seizure within 48 hours to his immediate official superior.

13. It is true that requirement contained in Section 57 of the NDPS Act is not compulsorily required to be made in writing. It can be made even orally as per the settled proposition of law enunciated by the Supreme Court in this regard. We are also conscious about the fact that requirement of Section 57 of the NDPS Act is directory and not mandatory. However, in the instant case, there are two versions coming from two responsible police officers with regard to compliance and non-compliance of requirement of Section 57 of the NDPS Act which raises doubt in the prosecution case. Therefore, in the absence of supporting or corroborating evidence to justify the prosecution case, noncompliance of the provisions contained in Section 57 of the NDPS Act is fatal to the prosecution case.

14. In this connection, it would be appropriate to refer to the judgment of the Supreme court in the case of Gurubax Singh v. State of Haryana, AIR 2001 SC 1002. In the said case, the Supreme Court has said that failure of investigating officer to make a full report of all the

particulars, next after arrest or seizure within forty-eight hours thereof, to his immediate official superior as provided under Section 57 of the NDPS Act and where the conduct of panch witness is unusual as he offered himself to be a witness for search and seizure and contradiction as to nature of the seal used by the investigating officer, conviction of the accused under the circumstances was not proper.

15. Applying the principles laid down by the Supreme Court in the above referred to judgment to the facts of the present case, at the risk of repetition be it stated that there are two versions with regard to compliance and non-compliance of the said provision from two responsible police officers, one who received the information and the other who carried out the raid in the presence of the officer who has received information and their evidence is bristled with contradictions, therefore, we are of the opinion that noncompliance of the said requirements is also fatal to the prosecution case.

16. So far as sealing of the sample is concerned, it also raises doubt in the prosecution case. In this connection, adverting to the evidence of Parsottambhai Virparaya (P.W.3), Ex.16, who was a responsible officer from FSL and who examined the sample of contraband article, he has admitted during his cross-examination that he received the parcel which was not sealed with red wax and the pin was not affixed on the plastic bag. In view of the aforesaid evidence of the responsible officer of the FSL, a doubt is raised with regard to the reaching of the sample in the same condition, therefore, possibility of tampering with the sample during the course of the transit from the police station to FSL cannot be ruled out.

17. In view of the aforesaid unsatisfactory nature of evidence led by the prosecution and the serious infirmities including nonobservance and noncompliance of the statutory provisions under Sections 41 and 42 of the NDPS Act as well as Section 57 of the NDPS Act, though it is directory and not mandatory, and the sample was received by FSL without red wax seal it cannot be said that the learned trial judge has committed any error in acquitting the accused of the offences with which they were charged. The finding, ultimate conclusion and resultant order of acquittal recorded by the learned trial Judge in our considered view is just and proper and in the set of facts and circumstances of the case no other conclusion is possible except the one reached by the learned trial Judge.

18. It is a cardinal principle of criminal jurisprudence that in an acquittal appeal, if other view is possible, then also the appellate court cannot substitute its own view by reversing acquittal into conviction, unless the findings of the trial court are perverse or contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable as held by the Supreme Court in the case of Ramesh Babulal Doshi v. State of Gujarat (1996) 9 SCC 225. In the instant case, the learned APP has not been able to point out as to how the findings recorded by the learned trial Judge are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

19. In the case of Ram Kumar v. State of Haryana, AIR 1995 SC 280, Supreme Court has said that the powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379 of the Code are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court has based its order acquitting the accused are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal.

20. This is an acquittal appeal in which the court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had the opportunity to observe demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the trial Court and in our view the expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so,

in view of the decisions rendered by the Supreme Court in the cases of (1) Girija Nandini Devi v. Bigendra Chaudhari, AIR 1967 SC 1124 and (2) State of Karnataka v. Hema Reddy and another, AIR 1981 SC 1417.

21. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondents. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondents and the learned APP has failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to the one already taken by the learned trial Judge.

22. Seen in the above context, as this appeal lacks merit, deserves to be dismissed by confirming the judgment and order of acquittal which is impugned in the appeal.

23. For the foregoing reasons, the appeal fails and accordingly it is dismissed. As the accused are on bail, their bail bonds shall stand cancelled and sureties are discharged.

(A.M. Kapadia, J.)

(H.H. Mehta, J.)

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